No. 278

Supreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

KING EDWARD TOBACCO COMPANY OF FLORIDA and MAY TOBACCO COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT MAY TOBACCO COMPANY.

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The reference to the opinions below, the grounds of jurisdiction and the statute involved are sufficiently stated in petitioner's brief and the appendix thereto except that the District Court rendered a supplemental opinion (RK 74, 24 Labor Cases, ¶68,056). Abbreviations to record references are the same as in petitioner's brief.

Questions Presented.

1. The principal question presented in the *May* case is whether its employees, employed in its packing plant who prepare for market its own tobacco leaf grown on its own farms, are engaged in agriculture as defined in Section 3(f) of the Fair Labor Standards Act and are, therefore, exempt under Section 13(a)(6) from the wage and hour provisions of the

2. Questions 2 and 3 stated in the brief of respondents Budd and King-Edward are also presented here. We adopt the argument of those points in that brief and shall not repeat them.

Statement of the Case.

As to May, the petitioner's statement of the case is inadequate and incomplete and necessitates the following restatement.

May was an intervenor in the *King-Edward* case (RK 37-39, 44). It was not a party to the *Budd* case even though the District Court decided the motions for summary judgment in both actions in a single opinion (RB 145; RK 55).

May is engaged in the business of raising and curing, in Gadsden County, Florida, U. S. type No. 62 tobacco for use as cigar wrapper (RK 67). This type of tobacco is grown only in Gadsden, Leon and Madison Counties, Florida, and in two counties in Georgia (RK 67).

May owns all of the farms which it operates, consisting of about 2,800 acres of woodland, grazing land and general farm land, between 80 and 100 acres of which is devoted to the planting, raising and harvesting of type No. 62 tobacco (RK 67-8, 84A). The initial stages of curing the tobacco also occurs in the curing barns on the farms (RK 69).

May also owns and operates a tobacco packing plant located in Quincy, Florida, about ten miles from its farms. At this plant the later stages of the curing of the tobacco and its preparation and packing for market are completed (RK 67-8).

No other tobacco except that produced on May's own farms is received at its packing-plant and it is only its own tobacco that is bulked and packed at that plant. May has never received into or handled at its packing plant any tobacco produced by others (RK 67, 71).

This tobacco is grown under muslin cloth or cheesecloth to provide shade (RK, 67). In harvesting this type of tobacco, as each leaf reaches a certain stage of maturity on the stalk, it is picked or "primed", the lower leaves being first picked, and this "priming" is repeated from four to seven times up the stalk as the tobacco leaves mature. At each priming the leaves are immediately taken into the curing barn located on the farm, strung and hung on sticks to dry, permitted to absorb moisture and then re-dried (RK 58, 69, 91-2). As each priming loses its green color and becomes a shade of brown, it is taken down, packed loosely and transferred to the packing plant where it is placed in bulks on the floor of the packing plant. The transfer from the curing barns to the packing plant must be prompt so as to avoid any harmful stoppage or acceleration of the intracellular changes taking place within the leaf (RK 69).

The handling of the tobacco in the packing plant consists of receiving it from the curing barns on the farm and piling the leaves into piles or bulks that contain between 3,500 and 4,500 pounds of tobacco. The bulking of the tobacco in the packing plant in this manner occurs during a period of approximately two to four months (RK 68). During that period the bulks are taken down from time to time and repiled or rebulked so as to take out the "hands" of tobacco from the middle of the bulk and place them on the outside, and at the same time to put those that were on the outside of the bulk on the inside. This aerates the leaf and prevents an excessive heating or fermentation in the middle of the bulk and assures that the natural changes in the leaf will be as uniform as possible in all the leaves throughout the entire bulk (RK 68). During the later stages of the bulking and upon its completion, the hands of tobacco are aerated and sprayed with water. This spraying is known as "kasing." This kasing is no part of the curing

procedure. It is not done to stimulate or affect the fermentation of the leaf, but is solely for the purpose of keeping the leaf sufficiently moist, soft and pliable to withstand handling without breakage or injury (RK 68, 71).

When the bulk-sweating is completed and the temperature of the bulk ceases to rise, the bulk is taken apart, the tobacco leaves are sorted and graded by hand and rebulked to dry out over a further period of from two to four months, after which they are baled in bundles or packages, still unstemmed, for sale and shipment to the cigar manufacturer (RK 68).

The same employees who plant, cultivate and harvest the tobacco and hang it in the curing barns on the farm also work upon it in the packing plant. In fact, 90% of these employees live either on May's own farms or on adjoining farmlands. While they are working at the packing plant, May takes them back and forth by automobile trucks from their homes on the farms to the packing plant (RK 68).

The treatment and care of the tobacco leaf from the time it is first hung in the tobacco barn after priming until the bulking is completed in the packing plant is nothing but one entire and continuous process of natural transformation within the leaf itself, necessary to make the leaf in its raw or natural state fit for use as cigar wrapper—the only use for which it is produced (RK 69). Thus, the changes in the leaf occurring at the packing plant would have continued if the leaf remained in the curing barn and the barn had proper temperature and atmospheric control. It is impossible to say when the intracellular changes or breakdown during the barn curing cease and the intracellular changes or breakdown during the bulking begin. In other words, the intracellular transformation which predominates during the barn curing on the farm continues after the leaf is moved into the packing plant and the bulk-sweating is

begun; similarly, those intracellular transformations predominating during the bulk-sweating actually commence while the leaf still is in the curing barn (RK 70). The expert relied upon so heavily by petitioner agrees that this is so (RK 25). Indeed, the only real reasons for the transfer from the barn to the plant are that the barns are not large enough to accommodate the quantity of leaf used in bulking and the curing would be too slow and lack uniformity if the leaf remained in the barns throughout the entire period of curing (RK 69-70).

This continuous, natural, internal transformation is accomplished without the addition, application or use of any external catalyst or other chemical or artificial stimulation or process (RK 69). Moreover, during the entire bulking operation the leaf is neither stemmed nor cut and is subjected to no other treatment (RK 68-9). The only significant activities of May's employees in the packing plant are (1) the handling of the leaf in the bulking and rebulking to assist the natural curing process occurring within the leaf itself (RK 64, 68-9) and (2) the sorting and baling of the leaf (RK 35).

In short, what commences as a leaf of tobacco in the curing barn ends as a leaf of tobacco in the packing plant.

Petitioner asserts that the bulking in the packing plant requires a large amount of valuable and expensive equipment (Pet. Br. 7). There is absolutely no basis for this claim in the May record. Actually, the bulking in the May packing plant does not require extensive or expensive equipment.*

* The District Court acknowledged that it had no basis for asserting that May's packing plant is equipped with machinery. (RK 55). Moreover, even in the *Budd* case the description of the equipment plainly indicates that it is not complicated or elaborate but only such as is necessary to regulate temperature and humidity (RK 35).

The important fact is that all of the steps in the curing of the tobacco in the barns and in the packing plant are essential for the marketing of the tobacco, as the opinion of the Court of Appeals emphasized (RK 93). Petitioner, aware of the significance of that fact and finding suggests doubt as to its validity (Pet. Br. 53-4). Actually, the record sustains the finding. Indeed, nothing could be more specific than the uncontradicted allegation in the affidavit of Robert F. Gardner that this tobacco, "is and was . . . consistently and regularly marketed and ready for market only when bulked, sorted and baled without stemming" (RK 35). But apart from this specific statement, the entire record is to the effect that the whole curing operation, from barn through packing plant, is for the very purpose of preparing the tobacco for sale and shipment to cigar manufacturers. There is not the slightest suggestion in the record that any sale of May's tobacco occurs until the curing is completed. To the contrary, there is the express statement that when the packing plant activities are finished the tobacco is baled "for sale and shipment to the cigar manufacturer" (RK 68).

ARGUMENT.

If May's employees at the packing plant are engaged in agriculture as defined in Section 3(f), it must prevail on this review and consideration of the scope and effect of the exemption afforded by Section 13(a) (10) is unnecessary. May will, therefore, deal with Section 3(f) and rely on the argument in the Brief of Respondents Budd and King Edward (Point II) with respect to the Section 13(a) (10) exemption.

POINT I.

May's employees employed in its packing plant are engaged in agriculture as defined in Section 3(f) of the Fair Labor Standards Act and are exempt under Section 13(a) (6) from the wage and hour provisions of the act.

The Plain Language of the Act.

Section 3 of the Act defines agriculture to include:

> "farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities * * *, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market" (App'x Pet. Br. 1).

Section 13(a) (6) exempts from the wage and hour provisions of the Act "any employee employed in agriculture * * *" (App'x Pet. Br. 2).

The District Court held that the farming exemption ends when the tobacco reaches the receiving platform of the packing house (RK 60). The Court of Appeals in the *King Edward* and *May* cases disagreed with this holding stating (RK 93):

> "It seems clear to us that a farmer cannot function without a market, that everything done by these farmers was essential for the marketing of their crops, and that the work of their packing house employees, in the preparation for market of the leaf grown exclusively on their farms, constitutes 'practices performed by a farmer as an incident to

or in conjunction with such farming operations, including preparation for market,' within the meaning of Section 203(f)."

The Court of Appeals was obviously correct. It is hard to conceive of a case more neatly fitting into the definition of agriculture than that shown by the May record. May owns its farms and handles at its packing plant only its own tobacco grown on its own farms (RK 67, 71). Obviously and concededly, May's raising, harvesting and barn curing of its own tobacco on its own farms is farming. Since the handling in the packing plant is a mere continuation of the curing of the leaf begun in the curing barns on the farm (RK 23, 69), it likewise is farming. In any event, so far as May is concerned, the bulking at the packing plant is a practice incidental to and in conjunction with its operations on the farm since the plant is merely the situs at which May completes the curing of its own tobacco exclusively. Finally, the bulking, sorting and packing of the leaf in the packing plant is all part of the preparation of the leaf for market—for without this preparation it would not be ready for market (RK 35).*

Consequently, both as to the activities on the farm and those in the packing plant May meets the statutory tests. It is a farmer, engaged in practices performed by a farmer as an incident to and in conjunction with its farming operations and in preparation of its own "agricultural commodity" for market.

Petitioner suggests (Br. 52-53, 57) that the activities at the plant are distinct, highly industrialized processing operations. At the plant, May's employees pile and re-pile

* Although the bulking, sorting and baling are essential steps in the preparation of May's tobacco for market, the statute does not require that they be essential. It suffices if the practices are, in fact, part of the preparation for market.

the leaf, and, at the late stages of the curing, spray it with water to make it moist, soft and pliable enough to handle without breakage (RK 68, 70). This is not highly industrialized processing. It is the simplest kind of manual labor, performed by the same farm hands who raise the tobacco and hang it in the curing barn (RK 68). The only "process" involved is the "process of natural transformation within the leaf itself" (RK 69), unaided by any external catalyst, chemical or artificial stimulation (RK 69). May's activities throughout are essentially no different from those of a farmer who plucks his fruit unripened and then guides the natural ripening process within the fruit itself by proper exposure to light, heat and moisture.

The Decisions of This Court:

Petitioner relies heavily upon *Mancja v. Waialua*, 349 U. S. 254. That case is readily distinguishable. In *Waialua*, the sugar cane was ground into raw sugar and molasses in its modern industrial sugar mill manned by employees specially trained in its operation (349 U. S. 257, 269). No such specialization and industrialization occurs at May's plant. What goes in as a leaf of tobacco emerges as a leaf of tobacco.

Actually, the opinion in *Waialua* supports May for several reasons.

First, it recognizes that *Waialua* presented a borderline case (349 U. S. 264). If the grinding and machine processing of cane into raw sugar and molasses were enough to lift *Waialua*'s milling activities out of the definition of agriculture, the absence of any such comparable activities suffices to keep May's packing plant activities within the definition. To hold otherwise would be to say that no off the-farm activity is embraced within Section 3(f). Yet, the statute explicitly declares otherwise.

Second, the Court in *Waialua* considered seven tests in determining whether an off the farm activity fell within the definition of agriculture in Section 3(f) (349 U. S. 264-265). *Waialua* failed to meet at least three, and possibly four, of these tests. May meets them all.

(a) In May, as in *Waialua*, the farm operations "are substantial, and * * * are no mere facade for an otherwise industrial venture" (349 U. S. 264).

(b) In May, the product resulting from the operation is unchanged. It is still tobacco leaf. In *Waialua*, sugar cane became raw sugar and molasses and yet the Court felt that there was some ground for considering these agricultural commodities "since the unmilled sugar cane is highly perishable and unmarketable as such" (349 U. S. 264-265). In May, the commodity is also highly perishable and unmarketable until completion of the curing at the packing plant (RK 35, 69).

(c) In May, the investment in the farms is so substantial that May has its own packing plant for its bulking activities. Yet, that plant is not so big and extensive that May engages in bulking tobacco grown by others (RK 67, 71).

(d) In May, obviously as much time is spent in the activities of raising and barn curing as in the bulking (RK 68) at the packing plant.

(e) In May, the same "ordinary farm workers" do the bulking, sorting and baling at the packing plant (RK 68) whereas in *Waialua* "the overall picture discloses essentially separate working forces for mill operations and for farming" (349 U. S. 265).

(f) In *Waialua*, the plantation organization had separate departments to handle the processing activities and field work. No such departmentalization is present in the May case.

(g) Finally, in *Waialua*, the mill workers were "typical factory workers" and the milling operation was "an industrial venture." In May, the employees at the packing plant are ordinary farm hands and there is no industrialization.

Despite the fact that *Waialua* failed to meet several of these tests, the Court classified it as a "borderline case" (349 U. S. 264); and said that the question was "an extremely close one in gauging whether this milling operation is farming or manufacturing." (349 U. S. 267) and that the position of farmers milling their own sugar "*vis-a-vis* the agriculture exemption may well be *sui generis*." The deficiencies of *Waialua* emphasize the completeness of May's qualification under Section 3(f) tested by this Court's seven "relevant factors" (349 U. S. 267). As stated in *Waialua*, what occurs in May's packing plant is "merely . . . a subordinate and necessary task incident to its agricultural operations" (349 U. S. 263).

Moreover, what was said in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U. S. 755,* is applicable here. In that case, "employees of a mutual non-profit irrigation company supplying water exclusively for farming purposes were held not to be employed in agriculture." Recognizing that irrigation "the activity of this company would constitute farming if done by a farmer," the Court nevertheless held that this particular company was not entitled to exemption saying:

> "But the significant fact in this case is that this work is not done by the company's employees." (337 U. S. 763).

* Congress amended section 13(a)(6) four months after this decision.

The opinion went on to stress that practices performed as an incident to or in conjunction with farming afforded an exemption "only if they are performed by a farmer or on a farm" (337 U. S. 766) and pointed out that "the work of the company's employees is done neither on a farm or by farmers" (337 U. S. 767).

These observations are dispositive here not only because May is a farmer but also because May's employees handle its own tobacco at its own packing plant.*

Petitioner's Misinterpretation of Legislative History.

Petitioner argues (Br. 42-3, 51-2) that the rejection of the tobacco warehousing amendment proposed by Senator Reynolds of North Carolina and similar amendments in the House indicates a Congressional intention to exclude from the definition of agriculture activities of the kind performed at May's packing plant. Senator Reynolds was referring to seasonal auction warehouses in the State of North Carolina to which growers of non-cigar tobacco brought their tobacco to have it auctioned off to manufacturers or dealers after the grower had cured and graded it. These warehouses are not in the least comparable to May's packing plant where May performs the second phase of the curing of its cigar tobacco prior to any sale. The disposition of these proposed amendments has, therefore, no significance in determining Congressional intent with respect to Section 3(f).

Petitioner also argues (Br. 52) that the omission of the word processing from Section 3(f) indicates a congressional intent to exclude from the definition of agriculture the kind of activities performed at May's packing plant. But Section 3(f) includes "any practices * * * performed

* See brief of respondents Budd and King Enterprises, Footnote 18, and *Currin v. Wallace*, 306 U. S. 1, 7.

by a farmer or on a farm as an incident to or in connection with such farming operations, including preparation for market * * *." The words "any practices" are much broader and all-embracing than the word "processing" and, therefore, resulted in a broader definition of agriculture than would have been the case if the more restrictive word "processing" had been used. Moreover, as pointed out (*supra*, p. 5), there is no processing at May's packing plant in the sense of any manufacturing operation or application of any external catalyst or other chemical or artificial stimulation of the natural curing process within the leaf itself. In any event, the debates in the Senate make it clear that the activity of a farmer in preparing his own crops for market, however characterized, was intended to be embraced within Section 3(f). (App'x Pet. Br. 47, 49, 52, 67-8, 76, 80-81).*

Petitioner (Br. 53) also seems to suggest that the omission of the word "processing" from the definition of employees engaged in agriculture in the bill in its then form indicates a congressional intent to omit from Section 3(f) the kind of activities performed at May's plant. But, the debates themselves show that Mr. Biermann, the sponsor of the proposed amendment defining employees engaged in agriculture, consented to the omission of the word "processing" because he felt that, "some Members thought that processing would include the making of cotton and wool into textiles and rubber into finished products, and a long list of things of that kind. The amendment I have offered includes only the first processing of things that come off the farm." (App'x Pet. Br. 91-2). Obviously Mr. Biermann

* The Brief of Respondents Budd and King Edward has a detailed discussion of the legislative history (Point I, B) which confirms May's contention that its packing plant activities are within the definition of agriculture.

omitted the word "processing" to assure members that his definition was not meant to embrace persons performing manufacturing operations. Obviously, also, he thought that his amendment without the word "processing" included the initial handling or processing of products as they came off the farm. The debates do not, therefore, support the suggestion that the omission of the word "processing" from what ultimately became Section 13(a)(10) disclosed a congressional intent to restrict the scope of the definition of agriculture in Section 3(f). To the contrary, they show an intent to include within the definition of agriculture the handling of May's tobacco that takes place in its packing plant after it leaves the curing barns.

Prior Departmental Construction of Section 3(f).

On August 21, 1939, the Department of Labor issued Interpretative Bulletin No. 14 (WHM 35-351, *et seq.*). Section 10 of that Bulletin deals with the term:

> "practices * * * performed by a farmer * * * as an incident to or in conjunction with such farming operations, including preparation for market, * * *,"

as used in Section 3(f).

Subdivision (b) of Section 10 of the Bulletin then states:

> "(b) The term 'preparation for market' must be treated differently with respect to various commodities. The following activities, among others, when performed by a farmer, seem to be included within the term:
>
> * * * * * * *
>
> "10. Tobacco—Handling, drying, bulking, stripping, tying, sorting, stemming, packing and storing."

Thus, from the very beginning the Department of Labor took the position not only that the activities of the kind

performed at May's packing plant fell within Section 3(f), but also that stripping and stemming did as well. Certainly, so far as May is concerned, the instant litigation represents a complete departure from and abandonment of that Interpretative Bulletin. Yet this contemporaneous construction of the statute is entitled to great weight. *United States v. American Trucking Associations*, 310 U. S. 534, 549.

To summarize, the plain meaning of the statute, the decisions of this Court construing it, its legislative history and the construction placed upon it by the Department of Labor itself all establish that May's employees who handle the tobacco leaf at its packing plant and prepare it there for market are employed in agriculture within the meaning of Section 3(f).

Conclusion.

The judgment of the Court of Appeals in favor of respondent May should be affirmed. Alternatively, the King Edward May action should be remanded to the District Court for trial.

Respectfully submitted,

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